

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL BRIAN TOOLEY,

Petitioner,

v.

JEFFREY UTTECHT,

Respondent.

Case No. C10-936-TSZ-JPD

REPORT AND RECOMMENDATION

I. INTRODUCTION AND SUMMARY CONCLUSION

The interest of justice requires the Court to answer a novel question: should a fully briefed, fully exhausted 28 U.S.C. § 2254 habeas petition nonetheless be dismissed *without* prejudice due to petitioner's apparent (post-stay) abandonment of this federal action in light of his partially *successful* state collateral attack that raised a number of unrelated grounds for relief that would, if raised in a later federal action, face a subsequent petition bar should the present petition be resolved on the merits?

The Court recommends **DISMISSING** Michael Brian Tooley's habeas petition *without* prejudice for failure to prosecute and failure to comply with court orders because doing so best preserves his habeas rights given his partially successful 2012 state collateral attack on several, unrelated issues and his decision not to communicate with the Court since February 2011. In the alternative, the Court recommends **DENYING** Mr. Tooley's habeas petition on the merits

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1 because it was objectively reasonable for the state appellate court to conclude that the Due
2 Process Clause was not violated, and the plea agreement was not breached, when the
3 prosecutor referred during sentencing to facts underlying an uncharged robbery. *See* (Dkt. 4, at
4 5); 28 U.S.C. § 2254(d)(1)–(2). An evidentiary hearing is unwarranted because the established
5 record refutes Mr. Tooley’s habeas claim. The Court recommends **GRANTING** issuance of a
6 certificate of appealability (“COA”).

7 **II. BACKGROUND**

8 Mr. Tooley filed his federal habeas petition in June 2010, alleging a single ground for
9 relief: the State violated his right to due process when the prosecutor breached the plea
10 agreement by referring to an uncharged, first-degree robbery during sentencing for his guilty-
11 plea conviction on second-degree murder. (Dkt. 4.) Respondent conceded that this issue had
12 been fully exhausted and addressed the merits. (Dkt. 11, at 3.) Mr. Tooley then suggested for
13 the first time on reply that the federal habeas proceeding should be stayed during the pendency
14 of a state personal restraint petition (“PRP”) that had been filed in June 2010. (Dkt. 14, at 1–
15 2.) The Court construed Mr. Tooley’s brief to be a motion to stay and abey and ordered the
16 parties to submit supplemental briefing. (Dkt. 15.) Respondent stated his lack of opposition to
17 Mr. Tooley’s motion to stay because the PRP proceeding raised four unrelated issues and, if
18 successful, the state-court action could moot the federal habeas petition. (Dkt. 16.) The Court
19 then stayed the habeas petition, voicing concerns that outright dismissal would mean that a
20 future federal habeas petition might be time-barred should the state PRP be dismissed as not
21 properly filed. (Dkt. 17.) The Court ordered Mr. Tooley and respondent *each* to file a status
22 report every ninety days, beginning on February 1, 2011. (Dkt. 17, at 2.)

23 Mr. Tooley filed a status report in February 2011 (Dkt. 20) but thereafter filed nothing
24 with the Court. When both parties missed a status-report deadline, the Court again ordered the
25 parties *each* to file a status report by December 9, 2011. (Dkt. 23.) Respondent complied but
26 Mr. Tooley did not. In March 2012, the Court ordered Mr. Tooley to show cause why the stay

1 should not be lifted because the State had reported that the state PRP proceeding had resulted
2 in partial relief and had been fully adjudicated. (Dkt. 26.) The Court warned that “a failure to
3 respond to this Order to Show Cause will be deemed a failure to prosecute his lawsuit in a
4 timely manner and may result in a recommendation that this petition be dismissed.” (*Id.* at 1.)
5 Mr. Tooley did not respond to the show-cause order. The Court then lifted the stay and set a
6 schedule for optional, supplemental briefing given that all of the issues had earlier been fully
7 briefed. (Dkt. 27.) Neither party filed supplemental briefing.

8 **III. DISCUSSION**

9 Although this case involves a fully briefed, fully exhausted ground for habeas relief, the
10 Court recommends dismissing the petition *without* prejudice for failure to prosecute and failure
11 to comply with court orders because circumstances suggest that doing so would be in the
12 interests of justice by preserving all of Mr. Tooley’s habeas grounds for relief in light of his
13 apparent abandonment of the present federal habeas action. In the alternative, the Court
14 recommends denying the habeas petition on the merits because the state-court adjudication that
15 no breach of the plea agreement occurred was not contrary to, or an unreasonable application
16 of, established Supreme Court authority, and was not an unreasonable determination of the
17 facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d)(1)–(2). An evidentiary
18 hearing is unwarranted because the established record refutes Mr. Tooley’s habeas claim.
19 *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (“[I]f the record refutes the applicant’s factual
20 allegations or otherwise precludes habeas relief, a district court is not required to hold an
21 evidentiary hearing.”). The Court recommends granting issuance of a certificate of
22 appealability.

23 **A. Dismissal Without Prejudice**

24 Mr. Tooley’s inaction presents the Court with an unusual quandary. On one hand, Mr.
25 Tooley has presented a fully exhausted habeas petition and there are no pending state-court
26 proceedings to prevent its immediate consideration. On the other, Mr. Tooley was *successful*

1 on one out of four grounds for relief in his state-court PRP proceeding, which led to certain
2 terms of his community commitment being stricken. (Dkt. 22-1.) Had Mr. Tooley not ceased
3 all communications with the Court, he could have moved to amend his present federal habeas
4 petition to include additional, fully exhausted grounds. Moreover, should the Court find
5 against him on the merits on the sole ground presented in his current habeas petition, Mr.
6 Tooley would face the high hurdle of having to seek authorization from the Ninth Circuit to
7 bring a second or successive habeas petition with these additional grounds in the future. *See*
8 28 U.S.C. § 2244(b)(3)(A). The Ninth Circuit will grant such authorization only if he can
9 make a prima facie showing under 28 U.S.C. § 2244(b)(2) that:

10 (A) the claim relies on a new rule of constitutional law, made retroactive to
11 cases on collateral review by the Supreme Court, that was previously
unavailable; or

12 (B)(i) the factual predicate for the claim could not have been discovered
13 previously through the exercise of due diligence; and

14 (ii) the facts underlying the claim, if proven and viewed in light of the evidence
15 as a whole, would be sufficient to establish by clear and convincing evidence
that, but for constitutional error, no reasonable factfinder would have found the
petitioner guilty of the underlying offense.

16 *See McNabb v. Yates*, 576 F.3d 1028, 1030 (9th Cir. 2009).

17 The Court finds that the interest of justice is served by dismissing Mr. Tooley's habeas
18 petition without prejudice for failure to prosecute and for failure to comply with court orders.
19 Should Mr. Tooley act diligently, there do not appear to be any immediate concerns that a
20 future, federal petition will run afoul of the Antiterrorism and Effective Death Penalty Act's
21 ("AEDPA") one year statute of limitations. In July 2011, the Washington Court of Appeals
22 granted Mr. Tooley's PRP on one ground, striking the community custody condition directing
23 mental health evaluation and treatment, and denied his other three grounds for relief. (Dkt. 22-
24 1), *also available at In re Tooley*, 2011 WL 2777350 (Wash. Ct. App. July 18, 2011).
25 Although the state appellate court denied the State's motion for reconsideration in August
26 2011, it also granted Mr. Tooley's motion for an extension of time to file a motion for

reconsideration. (Dkt. 25, at 1–2.) In February 2012, after Mr. Tooley had failed to file such a motion, the state appellate court issued the mandate on the PRP. (*Id.* at 2.) That mandate was then filed in the underlying criminal case at the trial-court level on **February 2, 2012**. *See State v. Tooley*, No. 05-1-09744-9 (entry dated Feb. 2, 2012), *located at* dw.courts.wa.gov (last accessed July 10, 2012). Under Washington law, the parties had thirty days to file an appeal of the reentered judgment. *See* Wash. R. App. P. § 5.2(a). AEDPA’s one-year statute of limitations thus presumably began to run on **March 5, 2012** (the Monday following the end of the 30-day time period on Saturday). Mr. Tooley thus appears to have until **March 5, 2013**, to file a federal habeas petition that may include any or all of his exhausted grounds for habeas relief. None of the dates can, however, be verified on the present record and Mr. Tooley should not rely on the Court’s illustrative calculations for determining whether a future petition will or will not be timely.¹

The Court recommends that Mr. Tooley’s habeas petition be dismissed without prejudice for failure to prosecute and for failure to comply with court orders. This result best accords with the interest of justice by preserving his present ground for habeas relief—as well other, fully exhausted grounds—for federal habeas review at a later time.

B. Alternative: Denial on the Merits

In the alternative, the Court recommends denying Mr. Tooley’s habeas petition on the merits. Mr. Tooley contends that the State violated the Due Process Clause by breaching the plea agreement during sentencing when the prosecutor referred to an uncharged, first-degree robbery. It was not unreasonable, however, for the state appellate court to conclude that the plea agreement was not breached because Mr. Tooley had already stipulated to the real facts underlying the uncharged robbery.

¹ Although miscalculation of AEDPA’s statute of limitations generally will not be considered an extraordinary circumstance warranting equitable tolling, *Holland v. Florida*, __ U.S. __, 130 S. Ct. 2549, 2567 (2010), and Mr. Tooley has hardly (of late) shown the necessary diligence in pursuing habeas relief, the Supreme Court has held that a habeas petition would not be barred as second or successive when filed after a resentencing that led to entry of a new judgment, *Magwood v. Patterson*, __ US. __, 130 U.S. 2788, 2796 (2010).

Under *Santobello v. New York*, 404 U.S. 257, 261–62 (1971), a criminal defendant has a due process right to enforce the grounds of his plea agreement. *See also Brown v. Poole*, 337 F.3d 1155, 1159 (9th Cir. 2003). The construction and interpretation of state-court plea agreements “and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law.” *Ricketts v. Adamson*, 483 U.S. 1, 6 n.3 (1987). Washington follows the “real facts” doctrine, which “requires sentences to be based on the defendant’s current conviction, his criminal history, and the circumstances of the crime.” *State v. Morreira*, 27 P.3d 639, 643 (Wash. Ct. App. 2001) (citation omitted). The real facts doctrine is based on RCW § 9.94A.530(2), which provides in relevant part:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information **than is admitted by the plea agreement**, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. . . . Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. . . .

RCW § 9.94A.530(2) (2008) (emphasis added), *declared unconstitutional in-part on other grounds*, *State v. Hunley*, 253 P.3d 448 (Wash. Ct. App. 2011), *petition for review granted*, 262 P.3d 63 (Wash. 2011) (Table); *see Morreira*, 27 P.3d at 643. Moreover, the ensuing subsection provides in relevant part:

Facts that establish the elements of a more serious crime or additional crimes may not be used **to go outside the standard sentence range** except upon stipulation or when specifically provided for in RCW 9.94A.535(3) (d), (e), (g), and (h).

RCW § 9.94A.530(3) (2008) (emphasis added).

At sentencing, the prosecutor referred to Mr. Tooley’s conduct after he committed the second-degree murder:

You add that in with the fact that after this was completed, the defendant went out and went to a local QFC with his gun and robbed the QFC for a lighter. Obviously he wasn’t being threatened sexually when he went to the QFC, yet he continued in a violent way with a violent threat against another human being, another human being who had to face the possibility that someone was going to use a gun on him. When you combine all of this violence together, I don’t

1 believe a low end sentence is appropriate in the case, and a sentence at the high
2 end is the most appropriate sentence.

3 (Dkt. 13 (State Court Record, hereinafter “SCR”), Exh. 12, at 5–6.) Mr. Tooley’s counsel
4 objected to this reference. (SCR, Exh. 12, at 17.) The sentencing judge agreed with defense
5 counsel and chose not to consider those facts when imposing the sentence. (*Id.*) The state
6 appellate court, however, disagreed with the sentencing judge. In granting the State’s motion
7 on the merits to affirm, the Court Commissioner found that the prosecutor’s discussion of the
8 facts underlying the uncharged robbery did not breach the plea agreement:

9 A plea agreement is a contract between the State and the defendant. *State v.*
10 *Sledge*, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997). The State’s duty of good
11 faith requires that it not undercut the terms of the agreement explicitly or
12 implicitly by conduct evidencing an intent to circumvent the terms of the plea
13 agreement. *Sledge*, 133 Wn.2d at 840; *State v. Jerde*, 93 Wn. App. 774, 780,
14 970 P.2d 781 (1999). The prosecutor’s actions and comments are reviewed
15 objectively from the sentencing record as a whole to determine whether the plea
16 agreement was breached.

17 Contrary to Tooley’s assigned error, the State merely argued the stipulated “real
18 facts” set forth in the Certification for determination of Probable Cause and the
19 prosecutor’s summary. Those documents referred to the shop lift of the lighter
20 at QFC and Tooley’s use of the gun to threaten the store clerk. Further, the
21 State’s reference to those facts was in the context of supporting the high end
22 sentence the State agreed it would recommend. The State did not explicitly or
23 implicitly undercut the plea agreement.

24 (SCR, Exh. 3, at 3–4.)

25 Nothing in the record suggests that the state appellate court’s adjudication of this issue
26 was contrary to, or an unreasonable application of, established Supreme Court authority, or
was an unreasonable determination of the facts in light of the evidence presented. *See* 28
U.S.C. § 2254(d)(1)–(2). The Court Commissioner noted that the plea agreement provided
that Mr. Tooley stipulated to the real facts set forth in the certification for determination of
probable cause and the prosecutor’s summary. (SCR, Exh. 3, at 1.) The Certification for
Determination of Probable Cause noted that police “were dispatched to a shoplift call at the
QFC Store. The shoplifter threatened an employee with a handgun when he was confronted
and fled in a car.” (*Id.* at 2.) The prosecutor’s summary noted that “[a]fter the homicide, the

defendant stole a lighter and threatened the clerk with a gun.” (*Id.*) Moreover, the State kept its promise to recommend the high end of the standard range of 220 months plus the firearm enhancement of 60 months, and Mr. Tooley was in fact sentenced to that term within the standard range. (*Id.*)

C. Certificate of Appealability

If the district court adopts the Report and Recommendation, it must determine whether a certificate of appealability should issue. Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts (“The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.”). A COA may be issued only where a petitioner has made “a substantial showing of the denial of a constitutional right.” *See* 28 U.S.C. § 2253(c)(2). A petitioner satisfies this standard “by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

The Court recommends that Mr. Tooley be issued a COA both as to the procedural issue of a dismissal without prejudice and as to the substantive basis for habeas relief because a jurist could conclude that the issues presented are adequate to deserve encouragement to proceed further.

IV. CONCLUSION

The Court recommends **DISMISSING** Mr. Tooley’s habeas petition *without* prejudice for failure to prosecute and failure to comply with court orders. In the alternative, the Court recommends **DENYING** Mr. Tooley’s habeas petition on the merits because it was objectively reasonable for the state appellate court to conclude that the Due Process Clause was not violated, and the plea agreement was not breached, when the prosecutor referred during sentencing to facts underlying an uncharged robbery. 28 U.S.C. § 2254(d)(1)–(2). An evidentiary hearing is unwarranted because the established record refutes Mr. Tooley’s habeas

1 claim. The Court recommends **GRANTING** issuance of a certificate of appealability. The
2 Clerk is directed to send a copy of this Order to the parties and to the Honorable Thomas S.
3 Zilly.

4 DATED this 13th day of July, 2012.

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6 JAMES P. DONOHUE
7 United States Magistrate Judge
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